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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

Supreme Court No. 1495

Court of Appeals No. 19,713

ANTHONY JOSEPH CIMINI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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WO. 2-8745—WO. 2-8732

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, by his attorneys, Louisell and Barris, prays that a Writ of Certiorari issue to review the judgment heretofore entered against him by the United States Court of Appeals, Sixth Circuit.

1. OPINIONS BELOW

The judgment of the United States Court of Appeals, Sixth Circuit, and the opinion of the court in support of said judgment was filed on March 4, 1970, but has not been officially reported. The opinion and judgment is set forth in Appendix A, *infra*, p. 15.

A Petition for Rehearing was filed, and an Order denying said Petition was filed without opinion on March 27, 1970. Appendix B, *infra*, p. 16.

2. JURISDICTION

The judgment of the United States Court of Appeals, Sixth Circuit, was entered on March 4, 1970, and an Order denying Petition for Rehearing was entered on March 27, 1970.

The jurisdiction of the court is invoked under Title 28, U.S.C. §1254(1).

3. QUESTIONS PRESENTED

The questions to be reviewed are:

(A) Did the Court of Appeals err in refusing to consider petitioner's first five grounds for appeal, including one of constitutional dimensions, because said grounds were not preserved for appellate review?

(B) Did the Court of Appeals err in refusing to consider petitioner's additional ground for appeal, as-

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serted after his brief had been filed, that no crime under the charging statute was committed?

(C) Did the Court of Appeals err in not holding that the trial court committed plain error when the court interviewed one of the jurors sworn in the case in chambers *out of the presence of petitioner* concerning her slight acquaintance with petitioner which she did not reveal on *voir dire,* all in violation of petitioner's rights under the Sixth Amendment to the Constitution of the United States?

(D) Did the Court of Appeals err in not holding that the trial court committed plain error in instructing the jury that petitioner did not contest the fact that the checks in question were forged and in failing to instruct the jury that an element of the offense was that the checks were falsely made and forged and that the jury had the duty of determining beyond a reasonable doubt that the checks were falsely made and forged?

(E) Did the Court of Appeals err in not holding that the trial court committed plain error in exceeding permissible limits in explaining to the jury upon their asking whether leniency could be recommended that the court would naturally take into consideration on sentence all extenuating circumstances?

4. STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The following are the constitutional provisions, statutes and rules involved:

(a) Sixth Amendment to the Constitution of the United States.

(b) Title 18, United States Code, Section 2314.

(c) Rule 52(b) of the Federal Rules of Criminal Procedure.

Amendment VI, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .; to be confronted by the witnesses against him . . .; and to have the Assistance of Counsel for his defense.

Title 18, United States Code, Section 2314:

> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; . . . Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Rule 52(b), Federal Rules of Criminal Procedure:

> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

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5. STATEMENT OF THE CASE

This is a criminal proceeding. An indictment was handed down on May 15, 1968 charging defendant with causing the transportation in interstate commerce of a falsely made or forged security, contrary to the provisions of Section 2314 of Title 18 of the United States Code (2a).* A one-day trial was had to a jury on November 14, 1968, and the next day the jury returned its verdict of guilty as charged in the indictment (77a). On the 29th day of January, 1969, the court imposed a judgment of sentence on defendant of commitment to the custody of the Attorney General for a period of two years (78a).

Defendant appeals from his conviction and the judgment of commitment.

The Government introduced testimony that defendant presented to the First National Building branch of the City National Bank in the City of Detroit, Michigan on January 30th a deposit slip in the amount of $7,250.00 (Exh. 1) (4a, 5a) and three checks for deposit to the account of Empire Cartage Co. (4a, 5a), a business owned by defendant (48a), totalling $7,250.00 (7a). One check (Exh. 2) in the amount of $2,200.00 was drawn on the Manhattan Chase Bank in the City of New York. The second check (Exh. 3) in the amount of $1,850.00 was drawn on the Chase Manhattan Bank in the City of New York. The third check (Exh. 4) in the amount of $3,200.00 was drawn on the Chase Manhattan Bank in the City of New York. All three checks bore the date January 29, 1968, the account number 202 025878, were made payable to Anthony

* All references are to pages in the Joint Appendix unless indicated otherwise.

Cimini, were drawn on the account of United Trucking Company and bore the signature of John S. May as the drawer (See Exhibits 2, 3 and 4). All three checks were so-called counter blank checks, which is to say that they were not checks printed especially for this account (17a).

At the same time, the defendant presented a check (the second check on Exh. 5; this exhibit contains photostats of three different checks) drawn by him on the same account with the City National Bank into which he was depositing the three checks (Exhs. 2, 3 and 4) in the amount of $3,200.00 made payable to himself and bearing date January 30, 1968 (11a). And in addition, at the same time, defendant presented to the teller a second check (the third check appearing on Exh. 5) drawn by him on his account in the City National Bank in the amount of $439.00 and some odd cents payable to City National Bank and offered in payment of a balance owing on a loan made by the City National Bank to defendant (11a).

The teller called the manager of the bank to her window and asked him if he wanted to approve the transaction, namely, the deposit of the three checks drawn on the New York Bank and the drawing of the two checks on the account of defendant in City National Bank (8a). The manager recognizing defendant as a customer of the bank and having dealt with him in the past, approved the transaction (8a, 9a, 10a, 12a). The check for $3,200 drawn by defendant on his account was cashed and he was given $3,200.00 in cash (8a). The check for $439.00 drawn by defendant was accepted in repayment of his loan with City National Bank.

The three checks, Exhibits 2, 3 and 4, were a few days later received by the City National Bank with designations that the account on which they were drawn did not exist (25a).

A representative of the City National Bank contacted defendant and told him that the three checks had not been honored and some arrangements would have to be made (21a, 22a). Defendant assured the representative that he would get in touch with the person who gave him the checks and all would be well (22a, 23a). Some few days went by and during which the representative of City National Bank was in touch with defendant (22a, 23a). The matter was "never resolved" and the checks were given to another department (23a).

An auditor of City National Bank testified that at the time of the deposit of three checks totalling $7,250.00, there was a balance of $28.53 in the account of Empire Cartage Co. (25a). Five checks were thereafter paid against the account (25a). With the three checks debited to the account, it was overdrawn $5,978.41 (26a). A registered letter was sent to defendant stating that his account was overdrawn (28a) and on February 29, 1968 two additional checks were drawn on the account (28a).

An FBI agent testified that he had interviewed with defendant on December 22, 1967 and then proceeded to recite what defendant told him about his business affairs (29a, 30a, 31a).

A real estate broker testified concerning the value of defendant's home, that defendant made application for a mortgage loan on his home which was denied at the last minute and that the broker advanced $2,000.00 to defendant (31a-40a).

The treasurer of a company doing business with Empire Cartage Co. testified as to business dealings between his company and defendant, nothing of which pertained to the three checks in question (40a-43a; 47a).

An investigator from the Chase Manhattan Bank testified that there was no account number such as appeared on the three checks with the Chase Bank and no account in the name of United Trucking Company or John S. May (14a, 15a).

Another FBI agent testified that he looked for the address 33 10th Avenue in New York and found that no such address existed (18a, 19a). He looked for a John S. May in New York and could find none (19a).

Defendant testified that he had received the checks from John S. May (48a), a person he had known from about the race track (50a) and other places of gaming (52a); that he tried to find him after the City National Bank had been in touch with him but has failed to find him (50a); that at the time he deposited the checks he thought that they were good (50a, 51a).

During the course of the trial, three significant things happened. One was that a juror was interviewed in chambers by the Court in the absence of the defendant concerning some matter which she failed to disclose on her *voir dire* (44a-46a). A second was the delivery of a note to the Court by the officer charged with keeping the jury that the jury wanted to go home (73a). The third was that the jury at one point came into the Court and asked the Court whether they could recommend leniency (74a-76a).

The jury returned a verdict of guilty as charged, the Court entered a judgment of conviction and committed defendant to the custody of the Attorney General for imprisonment for a period of two (2) years, under the provisions of Section 4208(a) (2), Title 18, U.S.C.

Notice of Appeal was filed on February 7, 1969.

Petitioner's conviction was affirmed by per curiam opinion by the United States Court of Appeals, Sixth Circuit, on March 4, 1970.

Petition for Rehearing was filed and an Order denying said Petition was entered without opinion on March 27, 1970.

After petitioner's brief was filed with the Court of Appeals, Sixth Circuit, but before hearing, petitioner petitioned the Court for leave to assert an additional ground of error. Appendix C, *infra*, p. 17.

The Court of Appeals entered no formal Order regarding said Petition, but heard petitioner's oral argument on the asserted additional ground of error.

6. REASONS FOR GRANTING THE WRIT

I.

Counsel who appeared for petitioner on trial of said cause is now dead. Petitioner maintained before the Appeals Court that counsel had been ailing the last two years of his life and had not acquitted himself well in behalf of petitioner.

None of the points forming petitioner's grounds for appeal were preserved for appellate review by proper objection in the trial Court. Petitioner claims, nonetheless, that the grounds presented for appellate review involve plain error under Rule 52(b), Federal Rules of Criminal Procedure.

One of the grounds presented for appellate review involve petitioner's right under the Sixth Amendment of the Constitution of the United States. The appellate Court

refused to review this ground because it hadn't been presented in the trial court. Nonetheless, petitioner could have that point passed upon in the District Court by Writ of Habeas Corpus. *Nance v. Baker*, 400 F2d 864; *Sanders v. United States*, 373 U.S. 1, 83 S.Ct. 1068.

And if the District Court were to rule adversely to petitioner upon his application for a Writ of Habeas Corpus, he would have the right to appeal to the Court of Appeals. Thus the very question which petitioner unsuccessfully asked the Appellate Court to review on direct appeal could be presented for compelled review in the same court through the route of habeas corpus. It would save expense to petitioner and time and inconvenience to all to have the appellate Court meet petitioner's claim of constitutional error on direct appeal.

The constitutional error which petitioner complains about is this. During his jury trial, one of the jurors sent a communication to the judge informing the judge that the juror had seen the defendant prior to trial and had failed to disclose this on *voir dire*. The judge then in chambers in the presence of defense counsel and the counsel for the Government and the court reporter *but in the absence of defendant* interviewed the juror concerning her knowledge of petitioner. She told the judge that she had seen the defendant in a bank on one previous occasion and that he had smiled at her.

Petitioner asserts that he had a constitutional right to be present at all stages of his trial, that the *voir dire* is an important stage of his trial, that the juror's communication to the judge in chambers was part of his trial whether it be regarded as an extension of the *voir dire* or as the giving of testimony, that had he heard the words of the juror in chambers *or even had he been made aware of the*

facts afterwards he might have assisted counsel by and through *his* recalling seeing the juror in question and his recalling further matters which transpired on that occasion, and he might have urged his attorney to insist that the juror step aside or that a motion for a mistrial be made.

Petitioner asserts that an important constitutional right of his had been infringed during his trial in his absence and without his being aware of the infringement in any manner whatever; that because said infringement occurred, his trial and subsequent conviction was completely vitiated because of constitutional infirmity; and that whether his counsel made objection or not, whether his counsel moved for a mistrial or not, it was incumbent upon the appellate Court to review the claimed constitutional error.

Petitioner asserts that the appellate Court should never stand on the formalism of an objection on the trial level to refuse to review a claimed constitutional error.

II.

Subsequent to petitioner's filing his Brief with the Court of Appeals, he petitioned the Court for leave to assert an additional ground of error, namely, that no crime was shown to have been committed. Petitioner asserted that if the drawer of the checks in question existed but the account on which he drew was non-existent, the checks were not forged nor were they falsely made. *Wright v. United States,* 172 F2d 310; *Martenay v. United States,* 216 F2d 760; *Martyn v. United States,* 176 F2d 609; *Greathouse v. United States,* 170 F2d 514; *Melvin v. United States,* 316 F2d 647. Petitioner testified that the drawer existed, and that the drawer had given the checks to petitioner; the Government did not show that drawer did not exist.

Petitioner was permitted to argue before the Court of Appeals the ground that no crime had been committed, and Justice Celebrezze questioned the attorney for the Government on his point.

Nonetheless, the Court of Appeals did not in its *per curiam* opinion advert one way or another to this thesis. In short, petitioner has not had an adjudication of the important point that he stands convicted of a crime when the evidence adduced by the Government does not show the commission of a crime.

Again, petitioner asserts that he has the right to test his conviction and sentence by an application for a Writ of *Habeas Corpus* on the basis that he is deprived of his liberty illegally because the evidence on his trial did not show that a crime was committed under the statute under which the charge was brought.

And if the District Court before which the application for Writ of Habeas Corpus is brought were to refuse petitioner relief, he would have the right to appeal the matter to the very same Court of Appeals which refused to pass upon the point on direct appeal.

III.

Petitioner on trial testified that he received the three checks in question from John S. May and at the time had believed that they were checks which would be honored. Nonetheless, the trial judge stated in his instruction to the jury "As I understand the position of the defendant in this case, he does not deny that the check was forged, was issued in New York on a bank". This was tantamount to the court's telling the jury that the false making and forging of the three checks was established and that they need

not bother themselves with determining this point. The court effectively invaded the province of the jury and did not require the jury to find as proven beyond a reasonable doubt all of the elements of the offense. This was error. *United States v. Manuszak,* 234 F2d 421.

In *Barry v. United States,* 287 F2d 340 the same error was committed by the trial Court and *even though counsel did not object and save the point for appellate review,* the appellate Court reversed. See also *DeCecco v. United States,* 338 F2d 798 and *Bollenbach v. United States,* 66 S. Ct. 402.

IV.

The trial judge committed plain error in practically inviting the jury to return a verdict of guilty on his assurance that on sentence he would take all extenuating circumstances into consideration. When the foreman of the jury sent out a note asking whether the jury could recommend leniency, the Court said to the jury, in part, "The Court does have a right and the authority under the statute to use his discretion in view of whatever facts may be in the case and the Court will do that. I don't want you to use that as a consideration for the determination of the guilt or innocence of the defendant." The fact that the jury made inquiry concerning their right to recommend leniency was evidence of the fact that they were not firmly convinced of defendant's guilt and the judge's words being the last words spoken to them were decisive. *Bollenbach v. United States,* 326 U.S. 607; 66 S.Ct. 402; *United States v. Link,* 202 F2d 592.

7. CONCLUSION

For the foregoing reasons, petitioner prays that this Petition for a Writ of Certiorari to the Court of Appeals for the Sixth Circuit be granted.

Respectfully submtited,

JOSEPH W. LOUISELL,
IVAN E. BARRIS.

Of Counsel:
Carl Ziemba

APPENDIX A

No. 19,713

UNITED STATES COURT OF APPEALS
for the Sixth Circuit

United States of America,
Plaintiff-Appellee,

vs.

Anthony Joseph Cimini,
Defendant-Appellant,

PER CURIAM ORDER

Filed Mar. 4, 1970

Before: Celebreeze and Brooks, Circuit Judges, and McAllister, Senior Judge.

This is a direct appeal from conviction for the transportation in interstate commerce of falsely made or forged securities. The defendant-appellant presented six issues on the hearing of this appeal. The first five were not preserved for appellate review and the sixth is whether he was ineffectively represented by his retained counsel.

We have reviewed the transcript and find that the defendant received a fair trial devoid of plain error, and that he was adequately represented by his retained counsel.

Affirmed.

Entered by order of the Court

/s/ Carl W. Reuss,
Clerk.

APPENDIX B

No. 19,713

UNITED STATES COURT OF APPEALS
for the Sixth Circuit

United States of America,
Plaintiff-Appellee,
vs.
Anthony Joseph Cimini,
Defendant-Appellant,

ORDER

Filed Mar. 27, 1970

The motion for rehearing filed by the defendant-appellant, Anthony Joseph Cimini, has been considered and it is denied.

Entered by order of the Court

/s/ Carl W. Reuss,
Clerk.

APPENDIX C

UNITED STATES COURT OF APPEALS
for the Sixth Circuit

The United States of America, Plaintiff-Appellee, vs. Anthony Joseph Cimini, Defendant-Appellant.	U.S. District Court No. 43489 Court of Appeals No. 19713

PETITION FOR LEAVE TO ASSERT AN ADDITIONAL GROUND OF ERROR

Now comes Anthony Joseph Cimini, defendant-appellant, by his attorneys, Louisell and Barris, by Carl Ziemba, and respectfully petitions the Court to grant him leave to assert an additional ground of error, to-wit:

Did the Trial Court err in failing to direct a judgment of acquittal in favor of defendant on the basis that no crime within the statute stated had been committed?

The Trial Court would answer "No."
Defendant-Appellant would answer "Yes."

ARGUMENT

There was no suggestion whatever from the evidence for the Government that defendant made or forged the three checks in question.

The fact that someone other than defendant drew the three checks on a non-existent account with the existent Chase Manhattan Bank does not make these three checks "falsely made or forged." *Wright v. United States,* 172 F2d 310; *Martenay v. United States,* 216 F2d 760; *Martyn*

v. United States, 176 F2d 609; *Greathouse v. United States,* 170 F2d 514; *Melvin v. United States,* 316 F2d 647.

The checks in question were drawn by John S. May on United Trucking Co. There is no suggestion in the evidence for the Government that these checks were not drawn by John S. May. From all that appears John S. May drew these checks on a non-existent account with the Chase Manhattan Bank. It follows that these checks were not forged or falsely made.

The jury might not have believed defendant's testimony of his meeting with John S. May. But if the jury disbelieved the defendant's testimony, there is still nothing in the record which indicates that these were forged or falsely made instruments. *Houston v. State,* 78 So 182 (1918); *Houston v. State,* 149 So2d 331 (1963); *Patty v. State,* 88 So 498; *Spratley v. Commonwealth,* 152 SE 362; *Presley v. Commonwealth,* 185 Va 261, 38 So2d 476; *Flowers v. State,* 143 Co 612; *Miller v. State,* 211 NW 278; *State v. Neely,* 300 Pac. 561.

The Government was obliged to complete its chain of proofs. The jury should not have been allowed to fill in the gaps and evidence by guessing and conjecturing. *Moore v. Chesapeake & O. Ry. Co.,* 340 U.S. 573; *Mitsugi Nishikawa v. Dulles,* 356 U.S. 138.

It is clear from the record that the Government never charged defendant with making the three checks here involved, Exhibits 2, 3 and 4. It is quite clear that the Government founded its charge against defendant on the fact that there was no account with the Chase Manhattan Bank upon which the checks were drawn. This simple fact, however, does not make Exhibits 2, 3 and 4 "falsely made or forged" as that language has been interpreted by the Courts. The record is entirely barren of any evidence of forgery or false making.

RELIEF SOUGHT

This Court should reverse the judgment and sentence of the Trial Court and discharge defendant.

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Dated: January 22, 1970.